IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1217 of 1992

with

CRIMINAL APPEAL No 243 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHRIMALI JALABHAI MAFATLAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1217 of 1992
MR VIVEK BAROT for Petitioner
MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent No. 1

2. Criminal AppealNo 243 of 1993
MR VIVEK BAROT WITH MR. B.N. RAVAL FOR APPELLANTS
MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE H.R.SHELAT
Date of decision: 03/07/96

ORAL JUDGEMENT

PER: DAVE, J:-

The present orders shall govern the disposal of these two appeals arising out of the very same judgment of conviction & sentence. The appellants were put on trial for the alleged commission of the offence punishable under Section 363 and 366 with Section 376 I.P.C.

It was the case of the prosecution that, victim Kapilaben, who was below the requisite age of 18 years was kidnapped or abducted from her father's house situated at Vankarvas, Unja, on January 30,1992. It was alleged that, the above said offence was committed with a view to force the victim to illicit intercourse or with a view to compel her to marry the accused No.1 Jagdishbhai @ Jayanti Bhikabhai. So far as the rest of the two accused persons are concerned, it was alleged that, they were having the common intention with the accused no.1 and they were acting in furtherance of the said common object.

Going to the details of the case, Kapilaben - the prosecutrix used to reside with her father Trikamlal Makwana at Vankarvas locality at Unja, and she used to study at a local Girls School. Kapilaben had come in close contact with accused no.1 during this time, and therefore, her father had thought it fit that Kapilaben should be lifted from the school and it was accordingly done. But as per the story of the prosecution, the happy relationship which was established during the school days could be continued, probably with the support of the original accused no.3 Kanchanben. The father of the victim had once seen victim Kapilaben with a photograph of the accused no.1 which was snatched by him. According to the case of the prosecution, on 30-1-1992 in pursuance to the previous plan Kanchanben had gone to the house of the victim, and the victim had left her house in company of Kanchanebn. They had travelled up to Ahmedabad and later on the marriage was got registered. Meanwhile the F I R was lodged and the accused persons came to be arrested. One another accused Dinesh, who is also said to be a co-accused participating in the crime has not been apprehended and therefore, his trial has been bifurcated by the trial Court. The charge at Exhibit 10 came to be denied by the present appellants. Learned

Trial Judge was pleased to come to the conclusion that the prosecution was able to establish the above said charges, and therefore, the accused persons have been convicted and have been sentenced as indicated above. The same judgment of conviction & sentence has been brought in challenge by filing the two appeals before us.

Learned counsel Mr. Vivek Barot and Mr. B.N. Rawal appearing on behalf of the appellants urge before us that, the prosecution evidence falls short of establishing the charges levelled against the accused persons. The emphasis is being laid on the important ingredient of the case of the prosecution regarding the age of the girl. The contention coming from learned counsels is that, the evidence in this respect is not only not satisfactory but it appears to have been divided into two sets and that, each of the two sets would try to nullify the other set. Argueing in the same line, learned counsels urge that, if it is our view that even before the Court below and before us there is a possibility of nurturing two views, then, that view which is in favour of the accused should be accepted. Learned counsels therefore urge that, at any rate it could not be said that the case of the prosecution against the appellants has been proved beyond reasonable doubt. The reaction on the part of learned Government Counsel Mr. S.T. Mehta in this respect is that, the evidence is not only trustworthy but is sufficient enough to convince a judicial mind and that, the second set of evidence on which the counsels for appellants are placing reliance should better be over looked, because the age of the prosecutrix has been duly established by the school record. Learned Government Counsel therefore urges that, there should not be any hesitation on our part to accept the evidence tendered by the prosecution already accepted by the Court below. In the opinion of the learned Government Counsel, therefore, there is no reason for us to interfere with the judgment of conviction and sentence recorded by the Court below.

Before going through the evidence in respect of the age of the prosecutrix on record, we would like to point out that, at the initial juncture also different versions have been given by the complainant father and the prosecutrix. Father Trikamlal Makwana, P.W-1, Exhibit-20 has said in his evidence that, Kapila - the prosecutrix used to study at Unja Umiya Mata Highschool in 10th class. When she was so studying it was brought to his notice that the accused no.1 Jagdish had developed some relationship with Kapila and that, his daughter Kapila was found to be roaming around the town and

elsewhere with Jagdish. His say further is that, later on also it was brought to his notice and it was within his knowledge that, Kanchanben - the accused no.3 was instrumental in keeping the link live. According to the complainant father, once he had an occasion to doubt that something serious was going on in his house with the assiatnace of Kanchanben, and tgherefore, he had followed Kapilan in the inner of the house and ultimately he, namely the complainant father was able to recover a photo picture of accused no.1 Jagdish from her custody. Thus the say of father Trikamlal right from the beginning is that, he could see a developed relationship betwen victim Kapilaben and accused no.1 and though she was lifted from the school, the link betwen them could be kept live with the assitance of Kanchanben. Not only this but Kapila was found to be with a photo picture of accused no.1 Jagdish.

contrary to the say of the complainant, there is the say of the prosecutrix Kapilaben, P.W. no.2 , Exhibit-27. For the reasons best known to her, which should not be difficult to be inferred, she has given the usual twist to the story by saying that, accused no.1 Jagdish used to harass her and therefore she had made the necessary complaint to her father and ultimately she was obliged to leave the studies. She has also tried to say that Jagdish, accused no.1 used to send letters to her through Kanchanben the accused no.3, who happens to be a cousine of her father. The evidence of Kapilaben also further go to show that she had managed to send 2 to 3 pairs of her garments well in advance through Kanchanben.

This evidence tendered by Kapilaben at Exhibit-27 obviously runs counter to the say of father Trikamlal at Exhibit-20. There is a significant variation which should not be over looked and which would suggest that the father wanted to say that, she was in love with Jagdish, while she at a later juncture, probably to give a different look to the case of the prosecution, has said that, she was being harassed.

The said discrepancy in the evidence of the complainant and the prosecutrix requires to be taken a notice of with the necessary care, because, as we would be able to point out at a later juncture, there has been two sets of evidence on the vital question regarding the age of the prosecutrix. A reliance was sought to be placed by learned Government Counsel on certain documents, which according to him would go to show that the victim was aged about 16 to 18 years on the date of the commission of the offence. The certificate given by

the Unja Municipality is at Exhibit-24, which would go to show that, a daughter was born to a couple , namely. Trikamlal Makwana and Parvatiben Makwana on 23.7.76. The Primary School Leaving Certificate at Exhibit-25 would go to show that Kapilaben was born on 23-7-1976. The High School at Unja has given the certificate at Exhibit-26, in which also the very same date, that is 23-7-1976 has been shown as the date of birth. Placing reliance upon this evidence, learned Government Counsel Mr. Mehta urges that, there is no scope for any interference on our part in respect of the finding recorded by the Court below regarding the age of the victim. Learned counsels for the appellants would invite our attention to the document known as " Masik Pragati Patrak" . This, of course came to be shown to the prosecutrix during her cross examination. As it would become clear and apparent from the discussion which follows, everything in respect of this Pragati Patrak came to be admitted by the prosecutrix during the course of her cross examination. Any how, this Pragati Patrak has remained as a "Mark". The necessary application was given before the learned Sessions Judge with a view to exhibit the same. Any how, the said document has remained as a Mark. Even if the said document is not exhibited, the say of the prosecutrix during her sworn testimony in this respect is abundantly clear.

During the cross examination she has stated that the Pragati Patrak in question belongs to her and that, it pertains to her, and that the School Teacher Manjulaben Patel has signed the same. Not only this, according to her, the Head Master of the School and the complainant father have also singed the Pragati Patrak. Thus, this evidence tendered by the prosecution would go to show that the Pragati Patraks was duly admitted by the prosecutrix during her cross examination as a document pertaining to her. The prosecutrix has also further said that the birth date shown in the said certificate has been taken from the school record. Thus, the above said oral evidence tendered by the prosecutrix would go to show that there was a document in existence which would kill the case of the prosecution. An important which should not be overlooked is the fact that this oral version concludes the position regarding the genuiness of the Pragati Patrak. It also requires to be appreciated that the victim herself had supplied the requisite data to believe the Accused No.1 that her girl friend had crossed the magic line of age.

There is the Memorandum Of Marriage at

Exhibit-37, which would go to show that, there has been a marriage between the accused no.1 and the prosecutrix and that, the above said marriage was performed by a priest known as Mahendrabhai Rawal. This memorandum would go to show and establish two aspects i.e. (i) that the marriage between the accused no.1 and the prosecutrix had taken place on the next day of the incident, and (ii) the Memorandum shows the age of the prosecutrix as 19 years. This is the vital document which would go to show that the prosecutrix was not under the age as required under the law. The prosecution wanted to urge before us also that Memorandum of Marriage appears to be a false and forged piece of paper, devoid of any evidentiary value. We are unable to accept this proposition becuase the Memorandum establishes the factum of the marriage between the prosecutrix and the Accused No.1. It would also be pertinent to note that, nothing has been brought on record to show that the marriage could have been registered by the Registrar blind foldedly on the mere askance of somebody, including the Accused No.1.

Thus, the Court below was confronted with two sets of evidence, one weighing in favour of the prosecution and the other one weighing very heavily in favour of the defence. But the settled legal position in this respect would be able to show that, if there are two possible views, that view should be acceptable which would be favourable to the defence and not the prosecution. This rule has been evolved in Criminal Jurisprudence. Obviously, because in a criminal trial the charges levelled against the accused are required to be proved beyond reasonable doubt, with the assistance of that quality of evidence which can be said to be legal, reliable and unimpeachable. If there are two sets of documents or two sets of oral version before the Court, each one running counter to the other, it can not be said that the question of facts, which some times could be mingled with the question of law, have been established beyond reasonable doubt, with the assitance of that branch of evidence which could be said to be legal, reliable and unimpeachable. The case law in this respect therefore goes to support the contention being advanced by the learned counsels for the appellants, namely that, in such a situation the Courts should accept that version which would go in favour of the accused. The Supreme Court pronouncement in LAL MANDI, APPELLANT VS. STATE OF WEST BENGAL,RESPONDENT, 1995 (3) SCC, 603, says that, if two views are possible, the benefit of doubt must be given to the accused. The second decision on this point is also the Supreme Court pronouncement in HARENDRA NARAIN SINGH etc., APPELLANTS VS. STATE OF BIHAR,

RESPONDENT, 1991 CRI.L.J., Page-2666 In this decision while speaking in respect of the cases, resting on circumstantial evidence and the appreciation thereof, the Supreme Court has pointed out that, if two views are possible, one pointing to the guilt of the accused and another to the innocence, the Court should adopt the latter view. This has indeed been said in respect of the circumstantial evidence. But nonetheless the principle has been made clearer by saying that, if two views are permissible or possible, that one which points out the innocence of the accused should be accepted by the Court in preferenced to the other leaning towards the prosecution.

Upon acceptance of the above said principle laiddown by the Supreme Court, it would become clear that the Memorandum Of Marriage shows that the date of birth of the victim which would make her not under the prescribed age but over the prescribed age. Her evidence during the cross examination would go to show that, her School Register which was handedover to the accused before the Registration of Marriage would also show the very same situation. A view could be taken on the basis of this evidence, both oral and documentary, that the victim was not under the prescribed age at the relevant time. The other view which could be taken on the basis of the School Leaving Certificate and the certificate given by the local authority, namely Exhibit-24 would be that, she was under the requisite age. But when the question comes as to whether which of the two possible views requires to be accepted, the answer shall have to be given in accordance with the principle laid down by the Supreme Court. Naturally, therefore, that view which does not run against the accused but leans in his favour should be accepted. If this principle is followed, it is abundantly clear that, our concentration should be on the Memorandum of Marriage and the say of the prosecution during her cross examination in respect of School Pragati Patrak. If this evidence is taken as the evidence for determining the real age of the prosecutrix, the conclusion would be that, she would not be under the requisite age. Following the principle laid down by the Supreme Court, we prefer to have this view while deciding the appeals.

Once this view has been taken, it is clear that the prosecution has not been able to establish beyond reasonable doubt that the victim was under the age on the date of the occurrence. The anomaly arising from the prosecution case in this respect should act for the benefit of the accused. The benefit should necessarily

go to the accused from this discrepancy.

Once the conclusion is reached that the victim was not under the age at the relevant time, no charge would be maintainable against the appellants. The evidence tendered by the prosecutrix would go to show that on 30-1-1992 upon a signal from Kanchanben, the accused no.3, the prosecutrix had left her paternal house and she had gone in company of Kanchanben upto the chowk in the town. Later on, according to her, she was advised to go towards Visnagar Tran Rasta and therefore she had gone there. Kanchanben had met her and thereafter they had travelled by a car and had reached Ahmedabad. Her say further is that, later on she was taken to a place within the town in the auto-rikshaw and she had signed a blank paper. During the cross examination she has stated that, on/or about 4-2-92 her relations had come there and she was apprehended. This evidence tendered by Kapilaben would go to show further that, she had left her paternal house in the company of Kanchanben, but before that she had arranged for her garments and that , later on, after reaching Ahmedabad the marriage was got registered.

If the conclusion is reached that the prosecutrix was not under the age on the above said date, the said evidence would go to show that in pursuance of an earlier arrangement she leaves the house, goes to the village chowk, prefers to travel by a car, reaches Ahmedabad and later on she goes for the Registration of the Marriage. It was sought to be suggested by learned Government Counsel Mr. Mehta that, the prosecutrix could not have done so by her own free will and that, at any rate, even if it is accepted that she was not a minor on that particular date the charge of abduction would remain. We are not able to accept this contention coming from learned Government Counsel. For establishing the charge of abduction under Section 366 of I.P.Code, the prosecution would be required to prove the employment of deceitful means or forceful compulsion. The case of Kapilaben regarding forceful compulsion has not been pressed by the learned Government Counsel. Even if the same were to be pressed, we are not inclined to believe that all through out, right from the leaving of the house uptill her apprehension from hired premises, Kapilaben was under some compulsion. If the compulsion were to be there, she had every opportunity to make necessary complaint at various places. Kanchanebn had parted just from the chowk of the town and at that time she could have returned to her paternal house. She could have complained to a passer bye even before boarding the car. She could have asked for help or could have raised a hue

& cry so that assistance of the village people could have been obtained. Strangely the prosecutrix does not resort to any of the modes under which she could have procured some assistance. This would lead us to the conclusion that the case of the prosecution regarding forceful compulsion can not be accepted.

The question regarding the employment by deceitful means also requires to be decided in the very same manner. As indicated by us earlier, the complainant father has said that she was having an affair with the accused no.1 since long and that was the reason for which her schooling was required to be terminated. The evidence of the father is clear that, even thereafter exchange of letters was going on and that, she was found to be in the custody of a photograph of the accused no.1. This all would lead us to believe and hold that, there was a relationship between the two and in furtherance of the very same relationship, she had under a pre-conceived plan decided to leave the house of the father. In this view of the matter the charge under Section 366 I.P.Code also does not get established.

Lastly, the arguments of the case of the prosecution in respect of the offence punishable under Section 376 I.P.Code, for the very same reasons and on the basis of very same evidence, we are inclined to take a view that the prosecutrix had left her parental house under a pre-conceived plan and later on after reaching Ahmedabad the marriage between them was got registered and later on they were found to be living in the hired premises. Some of the witnesses who could have thrown light regarding the way and manner in which they used to leave at Ahmedabad have not been examined. But the evidence tendered by PSI Chowdhari, P.W. No.5, Exhibit-35 would go to show that, during the investigational stage it was found that the victim and the accused no.1 had taken on lease the residential premises, and at that time the prosecutrix and the accused no.1 had said that they are a newly wedded couple and were in search of residential premises. This evidence tendered by PSI Chowdhari would go to show that, during all the material times the prosecutrix had preferred to say that she was the legally married wife of the appellant accused no.1.

Regard being had to all this evidence,we do not say that the relationship was only platonic. We feel that this was established under the clear consent and free will of the prosecutrix. If this were to be the real position, the provisions contained under Section 376

I.P.C. would not get attracted. It would be difficult to perceive that the physical relationship could have been established between the couple without the consent and free will of the prosecutrix. The evidence tendered by the prosecution falls short of convincing us on this point. We hasten to say that the position would have been otherwise, if the prosecution were able to establish that the girl was under the requisite age on the date of the occurrence and that, her consent or free will would not amount to a consent or free will in the eye of law. If once this position is accepted, we shall have to say that the physical relation between the accused no.1 and the victim would not take the colour of the offence punishable under Section 376 of I.P.Code.

The Supreme Court pronouncement in case of THAKORLAL D. VADGAMA, APPELLANT V. THE STATE OF GUJARAT, RESPONDENT, AIR 1973, PG. 2313, has been pressed in service by learned Government Counsel Mr. Mehta. The emphasis is laid by learned Government Counsel on the following observations of the Supreme Court occurring at page-2321.

" The two words "takes" and "entices", as used in Section 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him."

What is falling from the Apex Court as pointed out by learned Government Counsel Mr. Mehta and quoted as above is eloquently clear. If it is shown by the evidence on record that the guilty party had laid a foundation by inducement, allurement or threat etc. and if this can be considered to have been influenced the minor, then, it would be difficult for the accused to plead innocence on the ground that the minor had voluntarily come to him. These observations indeed related to a case of a minor. But the emphasis being laid by learned Government Counsel is meant to buttress the stand that, it should not be open to an accused facing such a charge ultimately to urge before the Court that the minor had voluntarily come to him. We are in perfect agreement with the sentiments being expressed by learned Government Counsel in this respect. The decision in question succinctly places the law in the lime light by saying that, if the accused had laid a foundation by allurement, inducement or threat etc. it would not allow him to urge at a later juncture that the minor had come to him voluntarily.

Incidentally,even upon approving the sentiments being expressed by learned Government Counsel Mr. Mehta, we shall have to point out that, we are dealing with a case in which it has not been proved by reliable evidence beyond reasonable doubt that, the prosecutrix was a minor on the date of the incident.

The conclusion therefore would be that the case of the prosecutrix in respect of the age of the prosecutrix is not free from doubt and that, because of a double set of versions the case in this respect has become doubtful and it goes on weakening from stage to stage. The benefit of doubt should necessarily go to the accused. We shall therefore have to say that the charges against the accused no.1 for the alleged commission of the offence punishable under Section 363, 366 and 376 I.P.C. have not been established. The charges against the rest of the accused for sharing a common intention with the accused no.1 for commission of the aforesaid offence are also not established. The accused persons therefore should have been in our view acquitted by the Court below. The present appeals therefore succeed and they are hereby accordingly allowed. The appellants are hereby acquitted of the charges for which they were found guilty by the Court below. The appellant in Criminal Appeal No. 243 of 1993 who happens to be the original accused no.1 is behind the bars. He should be set at liberty forthwith, if not required in any other criminal

case or proceedings. The appellants in Criminal Appeal No. 1217 of 1992 are on bail. Their bail bonds shall stand cancelled. Fine if any paid shall be refunded to the respective appellants.
